(8) (7)

Nos. 83-997, 83-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF TRANS WORLD AIRLINES, INC.

Petitioner in No. 83-997
Respondent in No. 83-1325

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act requires an employer to accommodate employees for an age-related reason merely because it provides accommodation for non-age-related reasons?

2. Whether specific intent to discriminate is necessary to establish a "willful" violation under the Age Discrimination in Employment Act?

3. Whether a labor union which jointly violates the Age Discrimination in Employment Act with an employer is absolved as a matter of law from liability for back pay?

PARTIES

Trans World Airlines, Inc., Harold H. Thurston, Christopher J. Clark, C.A. Parkhill and the Air Line Pilots Association, International are parties to the decision sought to be reviewed here. In addition, the Equal Employment Opportunity Commission and Nicholas Vasilaros, *et al.*, were intervenors in the court below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Regulations

Legislative Sources

Articles

Treatises

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PRELIMINARY STATEMENT

Trans World Airlines, Inc. ("TWA"),[1] petitioner in No. 83-997 and respondent in No. 83-1325, respectfully submits this brief on the merits in these consolidated cases.[2]

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 713 F.2d 940 and appears in the appendix to TWA's petition for certiorari in No. 83-997 at page A-1. The opinion of the United States District Court for the Southern District of New York is officially reported at 547 F. Supp. 1221 and appears in the same appendix at page A-44.

JURISDICTION

This Court's jurisdiction exists by virtue of 28 U.S.C. § 1254(1). TWA petitioned this Court for a writ of certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Second Circuit. The Air Line Pilots Association, International ("ALPA") subsequently filed a conditional cross-petition. Both petitions were filed within 90 days of the denial of rehearing by the Court of Appeals. TWA's petition was granted on February 27, 1984 (52 U.S.L.W. 3631), and ALPA's petition was granted on April 2, 1984 (52 U.S.L.W. 3720).

STATUTES AND REGULATIONS INVOLVED

Section 4(a) of the Age Discrimination in Employment Act ("ADEA") provides (29 U.S.C. § 623(a)):

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with

1 TWA has no parent, subsidiary or affiliate required to be reported under Rule 28.1 of this Court. Effective February 1, 1984, TWA was divested from Trans World Corporation.

2 Cases No. 83-997 and No. 83-1325 were consolidated pursuant to an order of this Court entered on April 2, 1984 (52 U.S.L.W. 3720).

> respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this Act.

Section 4(c) of the ADEA provides (29 U.S.C. § 623(c)):

> It shall be unlawful for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Sections 4(f)(1) and (2) of the ADEA provide (29 U.S.C. §§ 623(f)(1) and (2)):

> It shall not be unlawful for an employer, employment agency or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.

Section 7(b) of the ADEA provides (29 U.S.C. § 626(b)):

> The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided,* That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

Section 12(a) of the ADEA provides (29 U.S.C. § 631(a)):

> The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

Part 121.383(c) of the Federal Air Regulations provides (14 C.F.R. § 121.383(c)):

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

STATEMENT OF THE CASE

A. The Origin of the Case

This case has its genesis in the passage of the 1978 amendments to the ADEA that were signed into law on April 6, 1978. Pub. L. No. 95-256, 92 Stat. 189. These amendments prohibit, *inter alia,* an employee's involuntary retirement before the age of 70 by reason of a bona fide employee benefit plan.[3] The ADEA, however, still allows retirement before the age of 70 where:

> (1) "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business;"

---

3 Prior to the 1978 amendments, the ADEA had been interpreted to permit mandatory retirement at an age earlier than the statutory minimum of 65 if this was part of a bona fide employee benefit plan (such as a retirement, pension or insurance plan) and was not a subterfuge to evade the purposes of the ADEA. See *United Air Lines, Inc.* v. *McMann,* 434 U.S. 192 (1977). TWA's Retirement Plan is such a bona fide plan (J.A. 242, ¶ 5).

References to "J.A. ____" are to the Joint Appendix filed in the Second Circuit and part of the record below. By order dated March 19, 1984 (52 U.S.L.W. 3687), this Court granted the parties' motion to dispense with printing a new joint appendix, and all the parties have agreed to cite to the Joint Appendix below.

(2) "where the differentiation is based on reasonable factors other than age;" or

(3) where the retirement is in accordance with (i) "the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan;" (ii) is "not a subterfuge to evade the purposes of [the ADEA];" and (iii) is not as a result "of the age of [the] individual." (29 U.S.C. § 623(f)).

Because of these amendments, TWA began a review of its pilot collective bargaining agreement (which includes the pilot Retirement Plan) in order to ensure that the Company was complying with the new statute. Section 4.1 of the Retirement Plan provides that the "normal retirement date" for a pilot is his 60th birthday, and Section 4.2 says that pilots "must retire by their normal retirement date unless written approval of the Company is granted for continuance in employment." (J.A. 242, ¶¶ 4, 6; J.A. 410).

These two provisions have been in the Retirement Plan for many years, and at the time of the 1978 ADEA amendments, no one had served in a TWA cockpit beyond the age of 60 for at least two decades (J.A. 243, ¶ 7). Insofar as Captains and First Officers (co-pilots) are concerned, a regulation of the Federal Aviation Administration ("FAA") requires that "[n]o person may serve as a pilot . . . if that person has reached his 60th birthday" (14 C.F.R. § 121.383(c)). All parties agree that such an age limitation is a "bona fide occupational qualification" ("BFOQ") for the purposes of the ADEA (A-7 to A-8).[4]

However, on most jet aircraft, there is also a Flight Engineer who "is primarily responsible for pre-flight inspection and in-flight monitoring of the mechanical, electrical and electronic functioning of the aircraft." (A-6).[5] There is no FAA regulation

4 References to "A-__" are to the decisions below which appear in the appendix to TWA's petition for certiorari filed December 16, 1983.

5 On a few long flights, TWA also has an International Relief Officer ("IRO"). An arbitrator has ruled that an IRO essentially "relieves the Flight Engineer" (J.A. 607), although he can perform limited First Officer functions (J.A. 351, ¶ 2).

limiting that position to persons below the age of 60 (A-7). TWA therefore had to determine whether, in light of the 1978 ADEA amendments, Flight Engineers remained subject to mandatory retirement at age 60 (J.A. 243, ¶ 10).

B. TWA's Corporate Policy and the Subsequent Lawsuits

As part of its examination of the age 60 question, TWA met on several occasions with ALPA, the union representing all of TWA's flight crewmembers and the union with which TWA has a collective bargaining agreement ("Working Agreement").[6] It was clear from these meetings, however, that significant differences separated the parties (J.A. 243, ¶ 11). ALPA took the position that allowing anyone to serve in the cockpit beyond age 60 was not permitted under the Working Agreement and was not mandated by the ADEA. TWA contended that, as to Flight Engineers, service beyond age 60 was required by the new law (J.A. 1046-47, 1050-51).

On August 10, 1978, TWA finalized its position on the ADEA amendments and formally announced its corporate policy (J.A. 425). That policy was set forth in a telex posted for all TWA flight personnel (J.A. 243-44, ¶ 12). The bulletin stated that "any cockpit crew member who [was] in a Flight Engineer status at age 60 may not be compelled to retire." The policy also announced that those who wanted to work beyond age 60 would "be governed by the provisions of the current Working Agreement . . ." (J.A. 425). TWA thereby became the only trunk airline which voluntarily permitted former Captains to serve as Flight Engineers past age 60 (J.A. 487-88; 492, No. 12).

On the same day that TWA announced its policy, ALPA filed

6 Excerpts from the 1977 and 1979 Working Agreements are included at J.A. 250-400. (Any change in the 1979 Agreement from the 1977 version is noted by a line on the side of the text.) A new Working Agreement was also signed in April 1982 (A-46 n.2). In the Working Agreement, the word "pilot" is often used to comprise all flight deck crewmembers, including Flight Engineers (A-6 n.6).

suit against the Company in *ALPA* v. *TWA*.[7] The complaint alleged that TWA had gone too far by allowing anyone to serve in the cockpit past age 60. This was alleged to be a breach of the Working Agreement and a violation of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA") (J.A. 108-15).

Soon thereafter, several TWA Captains mandatorily retired at age 60 because there were no Flight Engineer vacancies prior to their 60th birthday also filed suit in *Thurston* v. *TWA and ALPA*. Their complaint alleged, *inter alia*, that TWA's "age 60" policy had not gone far enough to accommodate them and was therefore in violation of the ADEA (J.A. 58-73). The Equal Employment Opportunity Commission ("EEOC"), purporting to represent others similarly situated, intervened in *Thurston* as a plaintiff intervenor,[8] and *Thurston* was consolidated with *ALPA* (J.A. 457-58).[9]

C. The Operation of TWA's "Age 60" Policy

The August 10, 1978 bulletin which announced TWA's "age 60" policy was posted at all pilot domiciles. The announcement informed the pilot work force that:

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7 A group of "career" or permanent Flight Engineers, Nicholas Vasilaros, *et al.*, was permitted to intervene in *ALPA* v. *TWA* (A-49). Since they intervened on the side of the Company, they are not respondents here.

8 In view of this Court's recent decision in *INS* v. *Chadha*, ___ U.S. ___, 103 S. Ct. 2764 (1983), and the subsequent discussion in *EEOC* v. *Allstate Ins. Co.*, 570 F. Supp. 1224 (S.D. Miss.), *appeal filed*, 52 U.S.L.W. 3512 (Dec. 15, 1983), a threshold question arises whether the EEOC has the authority to enforce the ADEA. The issue was not considered below because briefs and oral arguments were completed prior to this Court's decision in *Chadha*. TWA reserves all rights in this regard in the event the case is remanded for further proceedings.

9 There was also consolidated at the same time a third case, *Cafferty* v. *TWA*. This case was originally brought in the Western District of Missouri by a group of TWA Flight Engineers at the bottom of the pilot seniority list. They alleged they had been furloughed because of TWA's policy of allowing Flight Engineers to serve beyond age 60. After their motion for a preliminary injunction was denied (488 F. Supp. 1076), the case was transferred to New York and was ultimately dismissed on August 28, 1981 (J.A. 451-53; 459-60). The plaintiffs did not appeal.

(1) "It [was] the Company's opinion that [the ADEA] amendments became effective April 6, 1978;"

(2) "Any cockpit crewmember who [was] in a Flight Engineer status at age 60 may not be compelled to retire;"

(3) "The terms and conditions of employment for Flight Engineers who elect to work beyond age 60 [would] be governed by the provisions of the current Working Agreement;" and

(4) "Flight Engineers [would] be subject to the provisions of the Federal Air Regulations applicable to TWA's operations and as such [could] not under any circumstances serve as a pilot after attaining age 60." (J.A. 425).

Subsequent to the posting of the bulletin, TWA sought to implement the policy as soon as possible. As the Second Circuit stated, "TWA immediately reinstated those who had been in flight engineer status on their 60th birthdays and had been retired after April 6, 1978. Flight Engineers reaching their 60th birthday after August 10, 1978 continued in that status." (A-9). Captains seeking to become Flight Engineers (and thereby avail themselves of an opportunity to work beyond age 60) could change their status to Flight Engineer "in accordance with the seniority and bidding procedures of the Working Agreement." (A-9).

The bidding procedures of the Working Agreement are the heart of the contractual seniority system and serve as the basic mechanism in deploying the pilot work force (J.A. 185, ¶ 3). The bidding procedures are outlined in Section 19 of the Working Agreement and apply to any TWA pilot, irrespective of age, who seeks to change status or location (domicile) (J.A. 185, ¶ 4).

In order to bid, a pilot normally files a "Standing Bid" showing his present status and domicile and listing his request (in order of preference) for a new status (J.A. 185, ¶ 5; 466). The Company is required under Section 19(C)(1) of the Working Agreement to "publish bulletins announcing vacancies

. . ." (J.A. 304). In such a bulletin (J.A. 470), the Company lists available vacancies on which pilots can bid, and vacancies are awarded in order of seniority (J.A. 185, ¶ 6).[10] Depending on staffing needs, there may be vacancies for Captains, First Officers and Flight Engineers at all the pilot domiciles, or the vacancies may be limited to less than all the available statuses or domiciles (J.A. 185-86, ¶ 7). In virtually any bidding situation where there is a vacancy, certain pilots will be awarded their bids, and others will be denied their bids. In each instance, however, the selection process is based on a pilot's seniority, *i.e.*, the date of hire with the Company (J.A. 186, ¶ 8).

If a Captain wishes to downbid to Flight Engineer, he files a bid for a Flight Engineer vacancy. If there is such a vacancy at the domicile where a downbidding Captain has requested to be assigned and that Captain has the highest seniority, then he is granted the bid in accordance with the provisions of the Working Agreement (J.A. 186-87, ¶ 11).[11]

As the Second Circuit recognized, "[m]ost of the 70 captains and first officers who have downbid for flight engineer positions successfully obtained that status before reaching 60." (A-10). Indeed, 83% of those Captains seeking to serve beyond age 60 have succeeded in that regard (A-61 n.8). In addition, there are over ninety "career" Flight Engineers who are serving or have served beyond age 60 (J.A. 189, ¶ 18).

D. Refinements to TWA's Policy

Since the adoption of TWA's policy, the procedure has remained essentially the same. Downbidding Captains bid for

10 Section 17(A)(3) of the Working Agreement specifically says that "[s]eniority shall govern all pilots in . . . their choice of vacancies, provided that the pilot's qualifications are sufficient for the operation to which he is to be assigned." (J.A. 294).

11 A summary of the bidding procedure is contained in the district court's decision (A-48). The "seniority system and the bidding procedures have existed at TWA since before 1967" (A-48), *i.e.*, before the passage of the ADEA or its 1978 amendments.

Flight Engineer, and once the bid has been awarded, each Captain is notified by form letter of the training requirements for Flight Engineer (J.A. 473-74). Of particular importance is the need to take and pass the FAA Flight Engineer written exam which has always been a prerequisite for entering Flight Engineer training.

In January 1980, the Company adopted a procedure of sending a separate form letter informing a downbidding Captain of the date of his Flight Engineer class (J.A. 477). The letter also notified him that if he failed to have proof of successful completion, his Flight Engineer bid would be cancelled. If otherwise qualified, he could return to the Captain status where he would be eligible to bid for another Flight Engineer vacancy (J.A. 188-89, ¶¶ 16-17).[12]

At about the same time, the Company also required that Captains be trained, whenever possible, prior to the effective date of their Flight Engineer bids so that they could fulfill their Flight Engineer bids in a timely manner (A-10 n.9). Previously, the Company had often permitted downbidding Captains to be trained after the effective date of their bids. However, ALPA brought to the Company's attention that this resulted in favoring downbidding Captains over the rest of the pilot work force who were normally required to be trained in a timely fashion so as to fulfill their bids on the effective date. In order to treat everyone equally, therefore, the Company's policy was changed so "that downbidding Captains be trained just like the rest of the pilot work force" (J.A. 859, No. 12c.6; 1068-69).[13]

12 This procedure, criticized by the majority below (A-12), is consistent with the Company's long-standing policy that if a pilot cannot qualify in a new status (in this case, Flight Engineer), then he reverts to his old status (in this case, Captain) (J.A. 188-89, ¶ 17). It was done to treat all pilots similarly situated in an equal fashion.

None of the current plaintiffs was impacted by this procedure. The two who alleged they were adversely affected by this procedure, W.T. Emrich and J.L. Clark (A-57 n.6), "have since settled" with TWA (A-10 n.10).

13 This change was also criticized by the majority below, particularly because of what it viewed as a premature reduction in pay for downbidding Captains (A-11 to A-12). However, the problem is exactly the converse: prior

(Footnote continued on following page)

E. Non-Age Accommodations in the Working Agreement

While the bidding procedures in the Working Agreement are the heart of the contractual seniority system, there are also some provisions in the contract to accommodate certain special circumstances unrelated to age. For example, a Flight Engineer who fails to qualify as a First Officer, or a First Officer who fails to qualify as a Captain, can revert to Flight Engineer without bidding for a vacancy. However, he "shall not thereafter be eligible to exercise a bid to a higher status." (Sec. 6(B)(16); J.A. 265-66). Similarly, a Captain who cannot maintain an FAA first class medical certificate is permitted to revert to Flight Engineer without a bid provided a second class medical certificate can be obtained (Secs. 19(A)(3) and (A)(4)(a); J.A. 302).[14] In this instance, as in the previous one, the procedure is unrelated to age and applies to anyone similarly situated.

As discussed *infra*, pp. 17-18, such provisions apply just as equally to the plaintiffs as to anyone else. However, they pertain to limited situations. Particularly when viewed in the context of TWA's handling a 3,000 pilot work force every day (A-5 to A-6), the number utilizing such provisions is minute. For example, no more than two people have ever reverted to Flight Engineer as a result of the loss of a first class medical certificate (J.A. 968), and only 20 have ever reverted to Flight

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to the change, Captains awarded Flight Engineer vacancies were obtaining a windfall in salary over their entitlement under the Working Agreement.

Even after the change, downbidding Captains have continued to receive the windfall of Captain's pay while in Flight Engineer training. This is because the Working Agreement requires that training pay be calculated on the basis of a pilot's prior two months' salary (Sec. 6(A)(2); J.A. 259). A downbidding Captain therefore receives more pay during Flight Engineer training than after training, but in order to apply the same pay formula to everyone equally, TWA pays its downbidding Captains in this fashion.

14 The Working Agreement says that "all pilots will be required to possess a first class medical certificate permitting the pilot to operate as pilot in command," *i.e.*, as Captain (Sec. 16(F); J.A. 292). The Federal Air Regulations specify the requirements for first class and second class medical certificates (14 C.F.R. §§ 67.13 and 67.15).

Engineer after failing to upgrade to the next higher status (J.A. 946-47).[15]

F. The Thurston and EEOC Plaintiffs

There are three named plaintiffs, H.H. Thurston, C.J. Clark and C.A. Parkhill, and seven other individuals represented by respondent EEOC (A-10 n.10). All are former TWA Captains, and as the Second Circuit recognized, all share one other crucial similarity: they "could not establish that there were flight engineer vacancies at the time they applied to transfer." (A-23). Since they could not remain in their Captain status beyond the age of 60 because of the FAA prohibition for "pilots," they were mandatorily retired.[16]

G. The Decisions Below

On the basis of these facts, the district court ruled that TWA's "age 60" policy complied with the RLA and dismissed

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15 The majority's decision below also refers to the situation where "as a disciplinary measure in response to demonstrated incompetence" (A-11), TWA has transferred a pilot to a lower position for which he was qualified. This has occurred only once during the course of this litigation and involved a pilot who was already trained as a Flight Engineer and had "priority rights" (unrelated to age) to the Flight Engineer seat (J.A. 627-29, No. 7). None of the plaintiffs is covered by the 1962 Agreement providing for such "priority rights" (J.A. 616; 492, No. 11).

16 Their retirement dates were:

Name	*Retirement Date*
A. M. Lusk	May 2, 1978
L. D. Bobzin	May 9, 1978
H. H. Thurston	June 11, 1978
C.A. Parkhill	August 22, 1978
R. Gowling	August 27, 1978
C. J. Clark	September 19, 1978
T. H. Widmayer	November 10, 1978
A. T. Humbles	September 14, 1979
H. W. Lewis	November 24, 1980
D. V. Roquemore	August 21, 1981

Today, all receive benefits under the Retirement Plan. Through December 31, 1981, payments totalled around $1,100,000. Each received during that period approximately $40,000-$45,000 per annum, and that amount increases each year (J.A. 889-90).

ALPA's complaint in *ALPA* v. *TWA* (A-50 to A-54). The court also granted TWA's motion for summary judgment in *Thurston* (A-54 to A-61). The court ruled that the plaintiffs "cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system." (A-57).

On appeal, the Second Circuit unanimously affirmed the district court's decision in *ALPA* v. *TWA* (A-13 to A-21). However, a majority of the panel reversed the district court's holding in *Thurston* and directed that summary judgment be entered in favor of the *Thurston* and EEOC plaintiffs. Judge Mansfield, in an opinion joined by the late Judge Waterman, held that "because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants must prevail on their ADEA claim." (A-31).

In fashioning its relief against TWA, the majority ruled that TWA's actions constituted a "willful" violation under Section 7(b) of the ADEA, 29 U.S.C. § 626(b), thereby entitling plaintiffs to "[l]iquidated or double damages" (A-33). The court's finding of "willfulness" was predicated on its view that "in a case based on discriminatory treatment, such as the present one, plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (A-33). Significant liability for liquidated damages was thus imposed against TWA even though there had never been an evidentiary hearing on the issue of intent or "willfulness."

In its initial decision, the majority also imposed money liability against ALPA. It found that while the statute "precludes a monetary damage award against ALPA," the plaintiffs were "entitled to recover back pay, an equitable remedy, against the union." (A-34). However, in a subsequent "Errata Sheet" released after the denial of the petitions for rehearing (A-37 to A-39),[17] the court deleted the entire paragraph relating to its prior holding that the plaintiffs were entitled to recover back pay from ALPA. This deletion resulted in making TWA, the employer defendant, solely liable for all payment of money under the court's ruling.

In dissent, Judge Van Graafeiland noted that the majority's attempt to compare TWA's treatment of its employees for non-age reasons with its treatment of the plaintiffs was "like comparing apples with oranges." He did not "believe" that was what "Congress intended" by its enactment of the ADEA (A-35 to A-36). He concluded:

> "Apparently, TWA is the only trunk airline that voluntarily has permitted pilots over 60 to continue working as flight engineers. Instead of receiving commendation for what it has done, TWA is held liable as a matter of law for age discrimination." (A-36).

SUMMARY OF ARGUMENT

The majority below has adopted a standard for liability under the ADEA whereby every time an employer provides an accommodation for a non-age reason it may now have to provide such accommodation for an age reason. Such a basis for liability is contrary to Congressional intent and established precedent. By having Captains bid for Flight Engineer positions in the same manner as flight deck positions are normally filled under the seniority provisions of the collective bargaining agreement, TWA treats everyone equally. That is all the ADEA requires. It certainly does not dictate that plaintiffs may enjoy a virtual guarantee of a new position based on age simply

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17 The actual "Errata Sheet" is printed at A-37, and the resulting changes in the decision are reflected in the markings made by TWA for the convenience of this Court at A-38 to A-39.

because, in very limited and different circumstances unrelated to age, they and the rest of the pilot work force might have received accommodations enabling them to obtain Flight Engineer positions.

The majority below further erred when it found that TWA's conduct was a "willful" violation under the ADEA, thereby entitling the plaintiffs to liquidated or double damages. Such a finding was made without any hearing and on the basis of admittedly inferred conduct. Indeed, in holding there was a "willful" violation here, the majority below adopted a standard whereby once there is a finding of discriminatory treatment, liquidated damages automatically follow. That is contrary to the clear Congressional intent to establish under the ADEA a two-tiered level of liability: one non-willful and one willful. The legislative history, sound reasoning and common sense dictate that a "willful" violation should only exist where a defendant actually *knew* it was violating the ADEA.

Finally, the majority erred when it found that a defendant union could not be jointly liable with an employer for money damages under the ADEA even though there was a finding of joint culpability. Holding unions liable for such damages would further the deterrent purpose of the ADEA and would be completely consistent with other national labor laws.

ARGUMENT

I. THE MAJORITY BELOW HAS ADOPTED A STANDARD FOR LIABILITY UNDER THE ADEA WHICH IS CONTRARY TO CONGRESSIONAL INTENT AND ESTABLISHED LAW

A. The Majority's Basis for Liability Is Predicated Upon a Misunderstanding as to What the ADEA Requires

The majority below held that "because TWA routinely accommodates other employees . . . for *non-age* reasons," it must "accord the *same* treatment to age-60 captains and first

officers . . ." (A-31).[18] The majority is therefore apparently saying that every time an employer accommodates an employee for a non-age-related reason, it should have to provide the same accommodation to someone claiming such entitlement simply because of age.

Such reasoning inevitably creates a *new* right based on age. The plaintiffs not only get the same accommodations for non-age reasons as everyone else, but they now seek to enjoy these accommodations based on age. For example, the majority notes that a Captain unable to maintain a first class medical certificate is entitled to revert to Flight Engineer "without being required to bid for the downgraded position." (A-10). What the majority ignores is that the number of times this has ever occurred is no more than twice (J.A. 968). That is hardly the "routine" accommodation claimed by the majority (A-31). Moreover, any of the plaintiffs who had lost his first class medical certificate would have been just as entitled to revert to Flight Engineer without a bid, *supra*, p. 12. Yet the mere existence of such a procedure should not mean that the plaintiffs now acquire automatic reversion rights at age 60. That would be, as the dissent notes, "like comparing apples with oranges." (A-35 to A-36).[19]

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18 Unless otherwise noted, emphasis in quotations is added.

19 The inappropriateness of such a comparison was also recognized by the arbitrator who decided the contractual grievance of plaintiff Thurston. While declining to rule on Captain Thurston's "legal" rights, the arbitrator specifically rejected the relevance of certain automatic downgrades (including the loss of a first class medical certificate) to the plaintiffs' situation here. "None of these provisions can be seen to have given Captain Thurston the right to *automatic* placement in a Flight Engineer position as claimed by grievant's counsel." (J.A. 530-31) (emphasis in original). The arbitrator, Harry T. Edwards, is now a member of the United States Court of Appeals for the District of Columbia Circuit.

In the same vein, the majority notes that a "jobless pilot who lacks sufficient seniority to displace is not discharged. Rather, he is placed on furlough status which may extend for up to 10 years during which time he continues to accrue seniority for purposes of a recall." (A-11). From this, the majority apparently suggests that TWA should do the same for the plaintiffs

(Footnote continued on following page)

It is also contrary to the ADEA's legislative history. The House of Representatives Report accompanying the 1978 amendments specifically says that the ADEA amendments do "*not require* employers to provide *special working conditions* for older workers to allow them to remain or become employed." H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 12 (1977). The same report (p.12) also states that "[w]hile . . . *retraining and transfers* to less physically demanding jobs may be of great benefit to the older employees and the employer alike, these activities *are not required* by this legislation."

Indeed, as noted in *Williams* v. *General Motors Corp.*, 656 F.2d 120, 129 n.13 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), the principle of neutrality "flows . . . directly from the ADEA's legislative history and avowed purpose." Based on its review of the legislative history, the court concluded in *Williams* that the ADEA "does not place an affirmative duty upon an employer to accord special treatment to members of the protected age group." Instead, a person's age "is accorded neutral status under the ADEA, neither facilitating nor hindering his employment, his chances for advancement, or his exposure to demotion or discharge." (656 F.2d at 129).

That was also the standard set by the Second Circuit in *Parcinski* v. *Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 725 (1983). In a decision by Judge Van Graafeiland, the dissenter here, the court held that the "ADEA does not require an employer to accord special treatment to employees over forty years of age. . . . It requires, instead, that an employee's age be treated in a neutral

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here. Of course, TWA *already* does the same for these plaintiffs because they would also have been placed on furlough if they lacked sufficient seniority to remain on the job "due to a reduction in force" (Sec. 20(A)(1); J.A. 861). However, that does not mean they become eligible for a new accommodation based on age. As the dissent notes, "a 60 year old pilot should not be entitled to take a ten year furlough from a job he is forbidden by law to perform, accruing seniority status in the process. I don't believe Congress intended that such a pilot should be permitted to take a nine-year vacation and return to work at the age of 69 . . ." (A-36).

fashion, neither facilitating nor hindering advancement, demotion, or discharge."[20]

By having Captains bid for Flight Engineer openings in the same manner as flight deck positions are normally filled under the collective bargaining agreement, TWA treated everyone in just such a neutral fashion. Under TWA's policy, 83% of those Captains seeking to serve beyond age 60 have succeeded in that regard pursuant to the terms of a neutral bona fide seniority system, *infra*, p. 21.[21] Yet that is not good enough for the plaintiffs and the majority below. What plaintiffs have been

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20 Accord, *e.g.*, *Cova* v. *Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978); *Pirone* v. *Home Ins. Co.*, 559 F. Supp. 306, 311 (S.D.N.Y. 1983); *Reilly* v. *Friedman's Express, Inc.*, 556 F. Supp. 618, 621 (M.D. Pa. 1983).

21 When the plaintiffs were unable or unwilling to change their Captain status in accordance with the normal bidding procedures of the neutral seniority system, they were mandatorily retired at age 60 because they were in a position admittedly subject to the BFOQ provision in the ADEA (A-7 to A-8). That is consistent with this Court's recent statement in *EEOC* v. *Wyoming*, ____ U.S. ____, 103 S. Ct. 1054, 1058 (1983), that the ADEA contemplates employers being "permitted to use *neutral criteria* not directly dependent on age, and . . . that even criteria that are based on age are occasionally justified . . ." It is also consistent with the ADEA's legislative history. Senator Javits, one of the floor managers of the 1978 amendments, stated that "an employer may justify a lower age for mandatory retirement for some reason other than age—for example, for airline pilots, if age is shown to be a bona fide occupational qualification." 123 Cong. Rec. 34,318 (1977). He concluded that if "an agency with regulatory authority finds that . . . a person is unable to perform his duties as an airline pilot, the law permits that retirement." (*Id.*)

The importance of such Congressionally contemplated mandatory retirement under the ADEA was recently recognized and approved in *Johnson* v. *Mayor of Baltimore*, ____ F.2d ____, 34 FEP Cases 854, 857 (4th Cir. 1984) ("Where Congress itself has deemed age to be a *bona fide* occupational qualification for federal firefighters," mandatory retirement at age 55 for municipal firefighters was permitted under the ADEA). The same is equally applicable here for pilots. In fact, Senator Yarborough, the floor manager of the original Act in 1967, specifically used as an example of a BFOQ under the ADEA "a jet pilot who flies a plane at many hundreds of miles an hour." 113 Cong. Rec. 31,253 (1967). *Cf.* also *Vance* v. *Bradley*, 440 U.S. 93 (1979), where this Court upheld the legality of Congressionally established mandatory retirement for Foreign Service officers at age 60.

given by the majority is a virtual *guarantee* of a new position based on age simply because, in different and limited circumstances, similar positions were provided to a few for reasons unrelated to age. Indeed, the EEOC openly states that its plaintiffs are entitled to "*affirmative action* programs" whereby they are "*automatically* placed in a Flight Engineer position" (J.A. 841-42, No. 10).[22]

Nowhere in the ADEA's legislative history has there been suggested such an extreme standard of liability. Moreover, such a standard is contrary to what this Court has held is necessary in the related context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII").[23] In *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577-78 (1978), this Court specifically said that the law "does not impose a duty" upon an employer "to adopt a . . . procedure that maximizes" the employment opportunities of a protected class.

At the time of the ADEA amendments in 1978, TWA was faced with the difficult task of satisfying the provisions of a new law and accommodating a 3,000 pilot work force whose movements were dictated by a pre-existing Working Agreement. That is something which this Court has recognized is a valid concern when it said that "[i]n many cases, . . . disruption of the existing seniority system [would] violate a collective-bargaining agreement, with all that such a violation entails for the employer's labor relations." *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 229 (1982).

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22 See also the discussion by Judge Edwards in his arbitration decision recognizing that what plaintiffs are seeking are "automatic" rights to the Flight Engineer position, *supra*, p. 17 n.19. It is particularly ironic that the EEOC would take such a position when its very own ADEA regulations for employers prohibit "giving preference because of age" (29 C.F.R. § 1625.2(a)).

23 As this Court has said in comparing the ADEA with Title VII, "[t]here are important similarities between the two statutes . . . both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978).

In the face of plaintiffs' claims that everyone should be allowed to serve as Flight Engineers past 60 and ALPA's claims that no one should serve past 60, TWA met both the obligations of the new law and the legitimate considerations of the Working Agreement.[24] The following chart shows that of those Captains seeking to serve beyond age 60 from the time of the ADEA amendments in April 1978 through the end of 1981, 83% have served or are now serving as Flight Engineers:

Year	*No. of Captains Seeking to Serve as F/E Beyond Age 60*	*No. of Captains Awarded F/E Bids Who Have Served or Are Serving Beyond Age 60*	*Percent*
1978	9	2	22.2%
1979	22	21	95.5
1980	12	10	83.3
1981	27	25	92.6
Total	70	58	82.9%[25]

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24 In that regard, courts are "generally less competent than employers to restructure business practices," *Furnco, supra*, 438 U.S. at 578. Despite this admonition, the majority's opinion ignores the need for TWA to comply with *both* the ADEA and the RLA. For TWA to have gone as far as suggested by the majority to comply with the ADEA, it faced the risk of being charged with violating Section 6 of the RLA. That section prohibits a unilateral "change in . . . rates of pay, rules, or working conditions" (45 U.S.C. § 156).

In view of ALPA's suit alleging just such a violation of the RLA (J.A. 108-15), TWA's concern was very real, and this Court has often recognized the need to accommodate conflicting federal statutes. See, *e.g.*, *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30, 40 (1957) ("There must be an accommodation of [the Norris-LaGuardia Act] and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved"); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 172 (1962) ("The policies of the Interstate Commerce Act and the [National Labor Relations Act] necessarily must be accommodated, one to the other"). TWA's policy represents just such an accommodation.

25 Source: J.A. 189-90, ¶¶ 19-20; 891-93B. This data is "unrebutted" (A-61 n.8), and the success rate is even higher (92%) if the transitional year of 1978 is excluded.

Accordingly, the fairness of TWA's policy is borne out by its actual results. This 83% success rate is convincing evidence that plaintiffs cannot prove "the ultimate question of discrimination *vel non*." *United States Postal Service Board of Governors* v. *Aikens*, ____ U.S. ____, 103 S. Ct. 1478, 1481 (1983).

B. Applying the General Standard of Liability in Employment Discrimination Cases, TWA Has Complied With the ADEA

The same nondiscriminatory conclusion is compelled by an analysis under the disparate treatment standard articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-04 (1973), and reaffirmed in *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-53 (1981).[26] There, this Court summarized "the basic allocation of burdens and order of presentation of proof in a . . . case alleging discriminatory treatment." (450 U.S. at 252). In the first instance, "the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination." (*Id.* at 252-53). If the plaintiff succeeds in that respect, then "the burden shifts to the defendant 'to articulate some legitimate,

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26 While *McDonnell Douglas* and *Burdine* were disparate treatment cases arising under Title VII, their standard for imposing liability has been utilized in many ADEA cases. See, *e.g.*, *Garner* v. *Boorstin*, 690 F.2d 1034, 1036-37 (D.C. Cir. 1982); *Massarsky* v. *General Motors Corp.*, 706 F.2d 111, 117-19 (3d Cir.), *cert. denied*, ____ U.S. ____, 104 S. Ct. 348 (1983); *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1100 n.7 (8th Cir. 1982); *EEOC* v. *Frontier Airlines, Inc.*, 673 F.2d 1155, 1158-59 (10th Cir. 1982); *Krieg* v. *Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S. Ct. 1712 (1984).

In a disparate treatment case, "[p]roof of discriminatory motive" by the employer "is critical" to establishing liability. *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). It is to be distinguished from claims of "disparate impact" which "involve employment practices that are facially neutral . . . but . . . fall more harshly on one group than another and cannot be justified by business necessity." (*Id.* at 336 n.15). The "disparate treatment" test is the predominant standard in ADEA cases, and it has been argued "that only disparate treatment claims should be available in age discrimination cases." Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 838 (1982).

nondiscriminatory reason for the employee's rejection.' " (*Id.* at 253). Finally, "should the defendant carry this burden, the plaintiff must then have an opportunity to prove . . . that the legitimate reasons . . . were a pretext for discrimination." (*Id.*)

While this test "was never intended to be rigid, mechanized or ritualistic," it can represent a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco, supra,* 438 U.S. at 577. Its application here convincingly shows that TWA's actions were nondiscriminatory.

1. *The Plaintiffs Cannot Establish a Prima Facie Case*

As the majority below noted, a "prima facie case of discriminatory treatment under the ADEA (as under Title VII) may ordinarily be made out by meeting the four requirements set forth in" *McDonnell Douglas* (A-23).[27] Applying the facts of this case to the general criteria in *McDonnell Douglas*, the district court properly said that in order to establish a prima facie case, a plaintiff must show:

> "1. he was a member of the protected age group;
> 2. he was terminated;
> 3. there was a vacancy in the position sought at the time he applied;
> 4. he was qualified for the position sought." (A-55).

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27 The four *McDonnell Douglas* requirements for establishing a prima facie case include (in a Title VII context) the following:

> "(i) that he belongs to a racial minority;
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
> (iii) that, despite his qualifications, he was rejected; and
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (411 U.S. at 802).

These standards, with modifications to meet particular situations, have often been applied in ADEA cases. See, for example, the discussion in *Williams* v. *General Motors Corp., supra,* 656 F.2d at 127-28, and cases cited at *supra,* p. 22, n.26.

As the district court recognized, "prongs one, two and four of the *McDonnell* test were facially satisfied" by the plaintiffs (A-56). All were "members of the protected age group, *i.e.*, between the age of forty and seventy; 29 U.S.C. § 631(a); each of them was terminated as pilots and forced to retire; most of them were 'qualified for the position sought,' *i.e.*, they were qualified to bid for and receive the position of Flight Engineer." (A-56). However, with respect to the question of an available vacancy, even the Second Circuit said "it is clear, as the district court held, that [plaintiffs] could not establish that there were flight engineer vacancies at the time they applied to transfer." (A-23).[28]

Despite this admission, the majority held that a "plaintiff is not barred by the *McDonnell Douglas* method from making out a prima facie case of age discrimination by alternative means, such as *direct* proof that an employer discriminates on the basis of age." (A-24) (emphasis in original). The majority's "evidence" in this regard was that "TWA grants the downgrading requests of all pilots with sufficient seniority except those of captains and first officers who reach age 60. This direct evidence of a differentiation based solely on age is sufficient to give rise to an inference of discriminatory motive, . . . and establishes, therefore, a prima facie case of discriminatory treatment." (A-24).[29]

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28 See also the discussion by the district court at A-56 to A-57. The importance of the need for a vacancy to show a prima facie case was fully recognized by this Court when it said that "the *McDonnell Douglas* formula . . . does demand that the alleged discriminatee demonstrate at least that his rejection did not result from . . . *the absence of a vacancy in the job sought.*" *Teamsters* v. *United States, supra,* 431 U.S. at 358 n.44.

This language from *Teamsters* was recently cited with approval in another ADEA case, *EEOC* v. *TWA*, 544 F. Supp. 1187, 1218 n.323 (S.D.N.Y. 1982). See also, *e.g.*, *Brody* v. *President of Harvard College,* 27 FEP Cases 496, 499 (D. Mass. 1980), *aff'd,* 664 F.2d 10 (1st Cir. 1981), *cert. denied,* 455 U.S. 1027 (1982) (requirement of vacancy under the ADEA in order to establish prima facie case).

29 This is in contrast to what the Second Circuit had said in *Cates* v. *TWA,* 561 F.2d 1064, 1074 (2d Cir. 1977), when it observed in a Title VII case that TWA's pilot seniority system "admittedly was *not* instituted for discriminatory reasons and has not been applied in other than a neutral manner . . ." See discussion, *infra,* p. 27.

The basis for the majority's conclusion, however, is simply wrong and reflects a misunderstanding as to how a seniority system operates. As this court said in *TWA* v. *Hardison*, 432 U.S. 63, 79, 81 (1977), seniority in the collective bargaining context "lies at the core of our national labor policy" and "seniority systems are afforded special treatment" under the law. This is because of their "overriding importance" in collective bargaining since they "determine who gets or who keeps an available job." *Humphrey* v. *Moore*, 375 U.S. 335, 346-47 (1964).[30] Implicit in that statement is this Court's recognition that in any seniority system, not everyone gets what he or she wants. TWA's pilot seniority system is no exception (J.A. 186, ¶ 8). This was recognized by the district court when it said that "in any bidding situation for a vacancy, the bidders frequently outnumber the vacancies and not all bids can be accommodated." (A-48).

As a result, the district court properly held that the plaintiffs "cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system." (A-57).[31]

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30 These principles were reaffirmed in *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 76-77 (1982). They are also consistent with this Court's holding in *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 608 (1980), that courts should not "second guess" such seniority systems, "reflecting as they do . . . the specific characteristics of a particular business or industry . . ." Such comments are particularly appropriate to seniority systems of commercial airlines which are all subject to the unique requirements of FAA safety regulations.

31 A recent district court decision has also viewed the lack of a vacancy as a possible determinative factor in rejecting a plaintiff's claims of age discrimination. In *Reilly* v. *Friedman's Express, Inc.*, *supra*, 556 F. Supp. 618, the plaintiffs alleged that they had applied for the disputed positions. In considering this question, the court noted that "[a] concomitant requirement with the need for the plaintiff to apply for that job is that a job actually exists. . . . *For if no job exists, it would be impossible for a plaintiff to prove he was not hired because of his age.*" (*Id.* at 623).

(Footnote continued on following page)

2. *Even If Plaintiffs Have Established a Prima Facie Case, TWA Has Provided a Legitimate, Nondiscriminatory Reason for Its Actions*

Even if, as the majority holds (A-24), plaintiffs have established a prima facie case, the neutral bidding procedure of the Working Agreement is a "legitimate, nondiscriminatory" reason for TWA's actions.[32]

In rejecting such a reason (A-25 to A-26), the majority ignored this Court's ruling in *Burdine* that the threshold necessary for an employer to show a "legitimate, nondiscriminatory" reason is not onerous. "The defendant need not persuade the court that it was actually motivated by the proffered reasons . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." (450 U.S. at 254-55).

This low threshold has been held to apply equally in ADEA cases. The Second Circuit has itself said that "the law does not require, in the first instance, that employment be rational, wise or well-considered—only that it be nondiscriminatory." *Powell* v. *Syracuse University*, 580 F.2d 1150, 1156-57 (2d Cir.), *cert.*

As its basis for this statement, the court relied on this Court's language in *Teamsters* on the need for a "vacancy," *supra*, p. 24, n.28, and also on *Smith* v. *World Book-Childcraft International, Inc.*, 502 F. Supp. 96 (N.D. Ill. 1980). There, the plaintiff was a branch manager in Illinois who had been terminated by the employer. As part of his ADEA complaint, he "allege[d] that he applied and was qualified for an available branch manager's position" in Knoxville, Tennessee (*id.* at 99). In rejecting his claims, the court ruled "that the position to which [plaintiff] requested transferral was unavailable at the time of his request. Consequently, it would be impossible for [plaintiff] to prove that World Book's failure to transfer him to Knoxville was predicated upon impermissible factors such as age." (*Id.*)

32 The legitimacy of this reason stems from the ADEA's protection in Section 4(f) (2), 29 U.S.C. § 623(f) (2), for "observ[ing] the terms of a bona fide seniority system." TWA's policy can also be viewed as "based on reasonable factors other than age" under Section 4(f) (1) of the ADEA, 29 U.S.C. § 623(f) (1). *Cf., e.g., EEOC* v. *Wyoming, supra*, 103 S. Ct. at 1058; *Aldendifer* v. *Continental Airlines*, 19 FEP Cases 1090, 1096 (C.D. Cal. 1978), *aff'd on other grounds*, 650 F.2d 171 (9th Cir. 1981).

denied, 439 U.S. 984 (1978). Accord, *e.g., Smith* v. *University of North Carolina*, 632 F.2d 316, 346 (4th Cir. 1980); see also, *Lieberman* v. *Gant*, 630 F.2d 60, 65 (2d Cir. 1980) (Title VII) ("It is enough for the defendants . . . to bring forth evidence that they acted on a neutral basis").

Clearly, TWA's "proffered" reason more than satisfies the necessary threshold. Not only did the district court recognize that TWA's seniority system "was instituted for nondiscriminatory reasons and . . . applied in a neutral manner" (A-60), but so has the Second Circuit itself in *Cates* v. *TWA, supra*, 561 F.2d at 1074. The court there stated that "the operation of the seniority system" in the TWA pilot Working Agreement "admittedly was not instituted for discriminatory reasons and has not been applied in other than a neutral manner . . ." "[I]ncorporated" in the Working Agreement, the seniority system "governs each pilot's job assignments . . . [and] eligibility for transfer," *Cates, supra*, at 1065. It "was instituted well before the effective date of the ADEA amendments and *is not in any way predicated upon age*; rather, it depends solely on length of service with the company." (A-60) (see also *Cates, supra*, 561 F.2d at 1066; Sec. 17(A)(1); J.A. 294).[33]

33 A bona fide seniority system requires that it be "applied fairly and impartially to all employees, that it not have its 'genesis in [unlawful] discrimination,' and that it be maintained free from illegal purposes." *Acha* v. *Beame*, 570 F.2d 57, 64 (2d Cir. 1978) (brackets in original). See also, *e.g., Morelock* v. *NCR Corp.*, 586 F.2d 1096, 1105-06 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979).

The seniority system of the TWA Working Agreement clearly meets all of these criteria. The system is neutral on its face and in its application, *Cates* v. *TWA, supra*, 561 F.2d at 1074, and it was designed at a time when the ADEA was not even enacted (A-48; J.A. 186, ¶ 9). The Working Agreement has adhered ever since to the same basic seniority system, which has been negotiated and maintained free from consideration of age (J.A. 186, ¶ 8).

The Working Agreement is also not a "subterfuge to evade the purposes" of the ADEA since, as noted above, it "was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion." *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974). Accord, *e.g., United Air Lines, Inc.* v. *McMann, supra*, 434 U.S. at 203; *Jensen* v. *Gulf Oil Refining & Marketing Co.*, 623 F.2d 406, 413 (5th Cir. 1980).

The plaintiffs, unable or unwilling to obtain a Flight Engineer vacancy prior to age 60 pursuant to the neutral provisions of the TWA pilot seniority system (A-23), were mandatorily retired as Captains because they were no longer qualified to perform that particular job. The FAA "age 60" rule prohibits the employment of anyone as a Captain beyond that age, and all the parties agree this rule is subject to the "BFOQ" provision in the ADEA (A-7 to A-8).[34] That was found by the district court to comply with the ADEA because "any denial of Flight Engineer status to pilots resulted from the neutral application of this bona fide seniority system and not by discriminatory treatment on the basis of age. Their forced retirement at age sixty was due solely to their reaching that age while in the pilot status." (A-60).[35]

Around sixty former TWA Captains are now serving or have served as Flight Engineers beyond age 60 (J.A. 189, ¶ 18). In each case, it is undisputed they have been filling Flight Engi-

34 Section 4(f)(1) permits retirement prior to age 70 "where age is a bona fide occupational qualification ['BFOQ'] reasonably necessary to the normal operation of the particular business" (29 U.S.C. § 623(f)(1)).

The House Report accompanying the 1978 amendments recognizes that employers have a right to have mandatory retirement at an age that is a BFOQ. The Report states "it is not intended that the [amendments] prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification . . . [under Section] 4(f)(1)." H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 12 (1977). See also comments by Senator Javits, *supra*, p. 19, n.21, and his comments at 123 Cong. Rec. 34,297 (1977) ("At the administration's request, clarifying language was approved which permits the establishment of a designated retirement age less than age 70 where the employer can show that age is a bona fide indicator of job performance"). *Cf. Johnson* v. *Mayor of Baltimore*, *supra*, 34 FEP Cases at 857, where the Fourth Circuit recently upheld under the ADEA the mandatory retirement of municipal firefighters at age 55 because "Congress has deemed age to be a *bona fide* occupational qualification for federal firefighters . . ."

35 Of course, under Section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), the seniority system cannot "require or permit" involuntary retirement because of age. However, as the district court noted above, it is not the seniority system which results in a pilot retiring at age 60 but the FAA "age 60" rule which is subject to the ADEA's "BFOQ" exception.

neer vacancies to which they were entitled by virtue of their positions on the pilot seniority list.[36]

3. *The Plaintiffs Cannot Show That TWA's Policy Was a Pretext*

Clearly, TWA has " 'articulate[d] some legitimate, nondiscriminatory reason for the employee's rejection.' " *Burdine, supra*, 450 U.S. at 253. The majority below therefore erred when it failed to take the third step in the *Burdine* standard and examine whether TWA's actions were "pretextual." (A-31 n.18).

Had the majority taken that third step, it would have found there was no such pretext. Since TWA has around sixty former Captains who have served or are now serving beyond age 60 as Flight Engineers and another ninety "career" Flight Engineers similarly situated (J.A. 189, ¶ 18), it is simply impossible to show that TWA's policy is "a pretext" for age discrimination. TWA is the only trunk airline which has voluntarily permitted former Captains to downbid to Flight Engineer and serve in that capacity beyond age 60.[37] This has been done in accord-

36 The majority's decision below criticizes not only TWA's basic "age 60" policy (A-9 to A-10), but it criticizes (A-11 to A-12) certain refinements made by TWA to treat everyone equally, *supra*, pp. 10-11. However, this Court has recognized in *California Brewers Ass'n* v. *Bryant*, *supra*, 444 U.S. at 607, that "[i]n order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment."

Moreover, it is obviously "legitimate" and "nondiscriminatory," *Burdine*, *supra*, 450 U.S. at 254, for TWA to require a threshold level of competence as a Flight Engineer by having written proof of successful completion of the FAA written exam at the time of training. See also *EEOC* v. *Frontier Airlines, Inc.*, *supra*, 673 F.2d at 1159, where, under the ADEA, a person's failure to meet pilot medical requirements at the time of training "presented sufficient evidence of nondiscriminatory reasons for preventing [him] from starting the [training] class." Of course, under Section 601(b) of the Federal Aviation Act, 49 U.S.C. § 1421 (b), TWA has the statutory duty "to perform [its] services with the highest possible degree of safety . . ."

37 See J.A. 487-88; 492, No. 12; see also J.A. 561, 562. Those carriers which have subsequently permitted former Captains to serve as Flight Engineers beyond 60 reacted only after lawsuits were brought to compel them to adopt such a policy.

ance with the neutral provisions of the Working Agreement, and it required no change in the language of the Working Agreement.

83% of those Captains who wanted to serve as Flight Engineers have done so, *supra*, p. 21. By any statistical criteria, this is compelling evidence of the fairness of TWA's "age 60" policy. Indeed, it strains credulity for anyone to claim there was intentional discrimination here when there has been an 83% success rate for Captains and a 100% success rate for "career" Flight Engineers. This record is unequalled amongst the trunk airlines, and it was accomplished despite ALPA's law suit against TWA for having adopted such a policy. As the dissent noted, TWA is really worthy "of receiving commendation for what it has done" (A-36).

The plaintiffs have therefore failed on every count to satisfy *McDonnell Douglas* and *Burdine*. They could not establish a prima facie case, and even if they could, TWA has offered a "legitimate, nondiscriminatory" reason which plaintiffs are unable to show was pretextual. Accordingly, this Court should remand to the lower court with instructions to dismiss the complaint.

II. THE TEST FOR "WILLFULNESS" UNDER THE ADEA SHOULD REQUIRE PROOF OF SPECIFIC INTENT TO DISCRIMINATE

A. The Decision Below

The majority below not only erred in finding TWA liable under the ADEA, but it also erred in its rulings on damages even assuming such liability. Without benefit of trial and on the basis of nothing more than "an inference of discriminatory motive" (A-24), the majority held that TWA was guilty of a "willful" violation of the ADEA entitling plaintiffs to liquidated damages.

Under the ADEA, liquidated damages are "double damages . . . equal to the pecuniary losses sustained by way of lost wages" (A-33). The majority stated that in order to recover

such damages "in a case based on discriminatory treatment," "plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (A-33).

Under the majority's view, " '[i]n a discriminatory treatment case . . . an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason.' " (A-33 to A-34) (emphasis in original). It follows from this statement that any time there is a finding of disparate treatment (even when it is admittedly inferred) (A-24), liquidated damages *automatically* result.[38] That is inconsistent with the language of the ADEA, its legislative history, other statutes and basic principles of tort and general damages.

B. Liquidated Damages and the Two-Tiered Level of Liability

In Section 7(b) of the ADEA, Congress mandated "[t]hat liquidated damages shall be payable *only* in cases of *willful* violations of *this Act*." (29 U.S.C. § 626(b)). Congress has thereby clearly established a two-tiered level of liability under the ADEA, one non-willful and one willful.[39] The courts which

38 After quoting the test cited above, the majority's decision simply states: "Applying these principles, TWA was *clearly aware* of the 1978 ADEA amendments; indeed, it was required to post them, 29 U.S.C. § 627." (A-34). No finding was made that TWA knowingly acted with specific intent to discriminate, and indeed, it is "unrebutted" that 83% of those Captains seeking to serve as Flight Engineers beyond age 60 have succeeded in that regard (A-61 n.8).

39 See also *Lorillard* v. *Pons*, *supra*, 434 U.S. at 581, where the Court stated that "Congress altered the circumstances under which such awards [for liquidated damages] would be available in ADEA actions by mandating that such damages be awarded *only where* the violation of the ADEA is willful." See also *Syvock* v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (7th Cir. 1981) ("[T]he legislative history of the ADEA suggests that the Congressional framers thought that non-willful discrimination directed towards an individual was quite possible").

have best recognized the distinction between these two tiers are those which have required proof of specific intent to do an act forbidden by the ADEA. That is the test presently followed by the First and Seventh Circuits.

In the First Circuit, an " 'act is done "willfully" if done voluntarily and intentionally, *and with the specific intent to do something the law forbids*; that is to say, with bad purpose either to disobey or disregard the law.' " *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979). Similarly, in the Seventh Circuit, "a finding of willfulness should lie *only if* there is some showing as to the defendant's *knowledge of the illegality* of his actions." *Syvock* v. *Milwaukee Boiler Mfg. Co.*, *supra*, 665 F.2d at 155.[40] Accord, *e.g.*, *Koyen* v. *Consolidated Edison Co.*, 560 F. Supp. 1161, 1165 (S.D.N.Y. 1983) (Weinfeld, J.) ("subscrib[ing] to the view that to entitle plaintiff to receive liquidated damages he must establish that the defendant acted with *knowledge of the illegality* of his action"); *Whittlesey* v. *Union Carbide Corp.*, 567 F. Supp. 1320, 1330 (S.D.N.Y. 1983) (following *Koyen*).

C. The Plain Language of the ADEA Supports Such a Test

As this Court has recognized, "willful . . . is a word of many meanings, its construction often being influenced by its context." *Spies* v. *United States*, 317 U.S. 492, 497 (1943). In this ADEA context, "Congress exhibited both a detailed knowledge of the FLSA[41] provisions and their judicial interpretation *and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.*" *Lorillard* v. *Pons*, *supra*, 434 U.S. at 581.

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40 The *Syvock* court reasoned that to allow liquidated damages for "willful" violations "without any showing as to the defendant's state of mind" would lead to automatic doubling in all disparate treatment cases. This result, the court continued, was without support in the ADEA's language or legislative history (*id.* at 154-55).

The *Syvock* language was most recently cited with approval by the Seventh Circuit in *Orzel* v. *City of Wauwautosa Fire Dep't*, 697 F.2d 743, 757-58 (7th Cir.), *cert. denied*, ___ U.S. ___, 104 S. Ct. 484 (1983).

41 The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*

The liquidated damages provision for "willfulness" presents precisely one such point of departure. The remedial provision of the FLSA incorporated into the ADEA is 29 U.S.C. § 216(b). That FLSA provision "[b]y its terms . . . requires that liquidated damages be awarded *as a matter of right* for violations of the FLSA." *Lorillard*, *supra*, 434 U.S. at 581 n.8. To avoid such automatic doubling for an ADEA violation, Congress expressly chose language in Section 7(b) indicating that liquidated damages were to be the exception and not the rule: "*Provided*, that liquidated damages shall be payable *only* in cases of *willful* violations of this Act." (29 U.S.C. § 626(b)).

Had Congress intended to be so generous in permitting double damages, it could have easily done so. Its proviso, however, is a clear indicator that it regarded the FLSA's automatic doubling as "undesirable or inappropriate for incorporation." *Lorillard*, *supra*, 434 U.S. at 581.[42]

D. The Legislative History Supports Requiring Specific Intent to Discriminate

While some courts are of the mistaken view that there is no legislative history defining "willful" under the ADEA,[43] there

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42 An example of how far the lower courts have strayed from the intent of Congress to have a two-tiered level of liability under the ADEA is evident from *Crosland* v. *Charlotte Eye, Ear and Throat Hosp.*, 686 F.2d 208, 217 (4th Cir. 1982), which holds that " 'an employer acts willfully . . . if he knows or has reason to know, that his conduct is *governed by* [the ADEA].' "

Given the prominence of the ADEA, such a test would read the statutory language "*only* in cases of *willful* violations" out of the ADEA. That would be contrary to the cardinal principle that a statute " 'ought . . . to be so construed that . . . no clause, sentence, *or word* shall be superfluous, void, or insignificant.' " *United States* v. *Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971). See also, *e.g.*, *Aero Mayflower Transit Co.* v. *ICC*, 535 F.2d 997, 1001 (7th Cir. 1976) ("If Congress intended that every civil violation . . . would activate Commission powers of revocation and suspension, regardless of fault, it would not have drafted 'willful' into" Section 212(a) of the Interstate Commerce Act, 49 U.S.C. § 312(a)).

43 See, *e.g.*, *Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981); *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 282 (3d Cir. 1980). In this regard, the brief *amicus curiae* of United Air Lines, Inc. is equally wrong (p. 5).

actually are strong indications in the legislative history that Congress intended the liquidated damages provision to serve as a substitute for punitive damages. The standard TWA proposes, specific intent to discriminate, is entirely consistent with and best effectuates this legislative intent.

The original bill proposed by the Administration made it a crime to willfully commit any practice made unlawful by the bill. S. 830, H.R. 3651, 90th Cong. 1st Sess., 113 Cong. Rec. 2199 (1967) (remarks of Senator Javits). However, Senator Javits found "certain serious defects" in the Administration bill (*id.*) and introduced an alternative bill, S. 788, 90th Cong., 1st Sess. (1967). In place of the criminal provision, Senator Javits proposed language that formed the genesis of Section 7(b) of the ADEA. His proposed Amendment No. 125 provided that "[a]ny person who violates" the statute shall be liable for unpaid compensation, "and in the case of willful violation of this Act, in an additional equal amount as liquidated damages." 113 Cong. Rec. 7077 (1967). This language, with only minor modification, was enacted into the ADEA. In explaining his proposal, Senator Javits made it clear that liquidated damages were incorporated to deter and punish violators:

> "[T]he criminal penalty in cases of willful violation has been eliminated and a double damage liability substituted. *This will furnish an effective deterrent to willful violations* and at the same time avoid the difficult problems of proof which would arise under a criminal provision." (*Id.* at 7076).

From this, "[i]t is quite apparent that Senator Javits . . . held the view that liquidated damages could effectively supply the deterrent and punitive damages which both criminal penalties and punitive damages normally serve." *Dean* v. *American Security Insurance Co.*, 559 F.2d 1036, 1040 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). See also *Rogers* v. *Exxon Research & Engineering Co.*, 550 F.2d 834, 840 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) ("If the employer's conduct

has been such as to merit punitive treatment, then he is to be penalized by doubling the award").[44]

Given the Congressional interest in using the civil remedy of liquidated damages to deter and punish violations, guidance on the meaning of "willful" can properly be drawn from general tort standards for punitive damages.[45] Such an analysis supports the conclusion that specific intent to violate the ADEA should be the necessary test.[46]

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44 See also, *e.g.*, *Balmer* v. *Community House Ass'n*, 572 F. Supp. 1048, 1049 (E.D. Mich. 1983) (ADEA liquidated damages "overlap" with exemplary or punitive damages recoverable under state law); *Gifford* v. *B.D. Diagnostics*, 458 F. Supp. 462, 464 (N.D. Ohio 1978) ("liquidated damages are to take the place of punitive damages under the ADEA"); Smith & Leggette, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 Ohio St. L. J. 349, 369 (1980) ("Congress apparently meant the liquidated damages provision to serve as a substitute for punitive damages").

45 Generally, to recover punitive or exemplary damages in tort, there must be "certain aggravating circumstances, such as malice, wantonness, *willfulness*, oppression, gross negligence, or fraud . . ." 25 C.J.S. *Damages* § 123(1) (1966), at p. 1133. Such damages are given "as an enhancement of compensatory damages because of the . . . character of the acts complained of." 22 Am. Jur. 2d *Damages* § 236 (1965), at p. 322. See, *e.g.*, *Lake Shore & Mich. S. Ry.* v. *Prentice*, 147 U.S. 101, 107 (1893) ("guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages"); *Lee* v. *Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970) ("punitive damages . . . may be imposed if a defendant has acted *wilfully* [sic] and in gross disregard for the rights of the complaining party").

46 In presenting the ADEA, Senator Javits also stated:

> "We now have the enforcement plan which I think is best adapted to carry out this age-discrimination-in-employment ban with the least overanxiety or difficulty on the part of American business . . ." 113 Cong. Rec. 31,254 (1967).

His reference to "least overanxiety or difficulty" is a further indication that Congress did not contemplate automatic double damages or anything approaching such an easy standard of liability. See also, *e.g.*, *Hays* v. *Republic Steel Corp.*, 531 F.2d 1307, 1311 (5th Cir. 1976) ("The Senator's reference . . . could hardly have been made if there were an absolute imposition of liquidated damages").

A specific intent test also harmonizes with this Court's requirement that discriminatory purpose "implies more than intent as volition or intent as awareness of consequences." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979). Instead, it "implies that the decisionmaker," *e.g.*, an employer, "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (*Id.*) See also, *e.g.*, *Guardians Association* v. *Civil Service Commission*, ___ U.S. ___, 103 S. Ct. 3221, 3230 n.20 (1983) (White, J.) ("It is not uncommon in the law for the extent of a defendant's liability to turn on the extent of his knowledge or culpability").

The current confusion among the Circuits, and the resulting permissive standards in some for double damages, results from a wooden adherence to the traditional definition of "willful" in the civil context. There, it "often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental," *United States* v. *Murdock*, 290 U.S. 389, 394 (1933). Some Circuits—such as the Third, Sixth and Ninth—have applied this definition literally to the ADEA context, resulting in standards similar to those followed by the court below.[47]

Adherence to an "intentional, knowing or voluntary" definition therefore results in equating a finding of disparate

47 See, *e.g.*, *Blackwell* v. *Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983) (to show willfulness, an ADEA plaintiff must simply "show that the employer's actions were voluntary and intentional"); *Kelly* v. *American Standard, Inc.*, *supra*, 640 F.2d at 980 (a "knowing and voluntary violation" suffices for liquidated damages); *Wehr* v. *Burroughs Corp.*, *supra*, 619 F.2d at 283 (requiring only proof "that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent").

In contrast, the *Syvock* court specifically noted how its "focus on the defendant's state of mind at the time the alleged discriminatory acts occurred" differed from the misnomered "deliberate, intentional, and knowing" test adopted by the Circuits above. See 665 F.2d at 155. As noted previously, the *Syvock* court adopted its standard after examining the "legislative history of the ADEA" and concluding "that the Congressional framers thought that non-willful discrimination directed towards an individual was quite possible." (*Id.*)

treatment with a finding of willfulness. Where a jury finds in a disparate treatment case that a decision was made because of age, it "necessarily conclude[s] that [the employer's] action was intentional." *Goodman* v. *Heublein, Inc.*, 645 F.2d 127, 131 n.6 (2d Cir. 1981).[48] However, in the search for willfulness, a finding of disparate treatment should only begin the inquiry. Requiring specific intent to do an act forbidden by the ADEA is more faithful to the statute's plain language, its legislative history and the better reasoned opinions below. It should be adopted here.[49]

48 See also, *e.g.*, *Duffy* v. *Wheeling Pittsburgh Steel Corp.*, 33 FEP Cases 730, 736 n.4 (E.D. Pa. 1983) ("a violation is willful in any discriminatory treatment case").

49 If the specific intent test is not adopted, this Court should consider adopting a "good faith" standard. This was originally applied to ADEA cases in *Hays* v. *Republic Steel Corp.*, *supra*, 531 F.2d at 1311, and it permits a trial court to deny liquidated damages, in whole or in part, upon a "finding that the employer acted *in good faith* and had reasonable grounds for believing that its actions were not violative of the ADEA." *Elliot* v. *Group Medical & Surgical Serv.*, 714 F.2d 556, 558 n.2 (5th Cir. 1983). See also, *e.g.*, *Hedrick* v. *Hercules, Inc.*, 658 F.2d 1088, 1096 (5th Cir. 1981) (allowing "discretion to deny or reduce liquidated damages" upon a showing by the employer that it acted in a "good faith effort to comply with the ADEA through the establishment of guidelines" to be followed in implementing a reorganization plan).

In any event, it should be noted the Government is not entitled as a matter of law to recover liquidated damages here. As enacted in 1967, Section 7(b) of the ADEA specifically incorporated several FLSA sections, including the liquidated damages provision in 29 U.S.C. § 216(c). However, Section 7(b) made no provision for incorporating any *future* amendments to the FLSA, and the Government was not entitled to recover liquidated damages under the FLSA until an amendment in 1974. Pub. L. No. 93-259, § 26, 88 Stat. 73. It is a "well-settled canon" that where a statute like the ADEA " 'adopts the particular provisions of another [statute] by a specific and descriptive reference, . . . [s]uch adoption takes the [latter] statute *as it exists at the time of adoption*,' " *Hassett* v. *Welch*, 303 U.S. 303, 314 (1938). Therefore, the ADEA " 'does not include subsequent additions or modifications of the [FLSA] . . . unless it does so by express intent.' " (*Id.*)

When Congress amended the ADEA in 1978, it manifested no such "express intent" and could easily have done so. Accordingly, *Hassett* dictates that the powers granted to the Government in 1974 to recover liquidated damages under the FLSA were not incorporated in the ADEA.